IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-599

PARKHILL-GOODLOE COMPANY, INC. and
THE HOME INSURANCE COMPANY,
Petitioners,

versus

RUDOLPH McINTOSH (Claimant), DIRECTORS OF THE OFFICE OF WORKERS COMPENSATION PROGRAMS, U.S. DEPARTMENT OF LABOR, and U.S. DEPARTMENT OF LABOR, BENEFITS REVIEW BOARD, and U.S. DEPARTMENT OF LABOR, ESA-OWCP,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, Rudolph McIntosh, the claimant in this Longshoremen and Harbor Worker's Compensation Act case, opposes the Petition for Writ of Certiorari filed before this Court by petitioners, Parkhill-Goodloe, Inc. and The Home Insurance Company.

CITATIONS TO ORDERS BELOW

The initial decision finding in favor of compensability under the Longshoremen and Harbor

Worker's Compensation Act was rendered on September 8, 1975 by the trier of fact, the Administrative Law Judge, following the evidentiary hearing on the merits, the text of this Decision and Order appears on pages 22a through 33a in the appendix of petitioners' brief. Thereafter, a Supplemental Decision and Order reaffirming compensability was entered by the Administrative Law Judge on petitioners' Petition for Rehearing on October 29, 1975 a copy of which appears on pages 15a through 22a of the appendix to petitioners' brief.

The action was then appealed by petitioners to the Benefits Review Board of the United States Department of Labor which rendered its Decision affirming compensability on May 17, 1976, a copy of which appears on pages 3a through 14a of the appendix to petitioners' brief.

Petitioners then appealed to the United States Fifth Circuit Court of Appeals which entered a Per Curiam affirmance of the holdings below on April 1, 1977. A copy of this decision appears on pages 1a through 2a of the appendix to petitioners' brief. Petitioners thereupon filed a Petition for Rehearing En Banc which was denied by the Fifth Circuit Court of Appeals by its Order entered May 31, 1977 a copy of which appears on pages 2a through 3a of petitioners' brief.

JURISDICTION

Respondent McIntosh challenges the contention of petitioners that this case is a proper matter for review

by a writ of certiorari, and that jurisdiction of this Court is proper under Title 28, United States Code Annotated, Sections 1254(1) and 2101 as well as United States Supreme Court Rule 19. Under Rule 19 of this Court this is not a matter deserving consideration for review by a writ of certiorari. It does not involve a constitutional question, conflict jurisdiction, an important question of federal law, or departure from the accepted and usual course of judicial proceedings. It involves solely the factual findings of the trier of fact, the Administrative Law Judge, in a Longshoremen and Harbor Worker's Act case. Having made that factual determination the Administrative Law Judge applied the law and held the claim compensable. That determination of the particular factual pattern of this case was fully litigated at the trial level, and appealed to the Benefits Review Board, and to the Fifth Circuit Court of Appeals. Respondent McIntosh therefore contends that this case which is presented solely as a challenge to findings of fact by the trier of fact is not a proper matter for review under Rule 19 by a writ of certiorari.

QUESTIONS PRESENTED FOR REVIEW

1. Whether the findings of fact by the trier of fact, the Administrative Law Judge, based upon evidence received at the evidentiary hearing which were appealed to and affirmed by the Benefits Review Board and appealed to and reaffirmed by the United States Fifth Circuit Court of Appeals are a proper matter for this Court to review by certiorari?

2. Whether the conclusions of law of the Administrative Law Judge affirmed by the Benefits

Review Board and reaffirmed by the United States Fifth Circuit Court of Appeals are proper subjects for review by this Court by Writ of Certiorari?

CONCISE STATEMENT OF THE CASE

This case is a workmen's compensation claim under the Longshoremen and Harbor Worker's Compensation Act as amended and is appealed to this Court on the findings of fact of the trier of fact. A two day evidentiary hearing was held before the Honorable Walter J. Sullivan, Administrative Law Judge, United States Department of Labor on July 15-16, 1975. The employer and carrier were represented by two experienced trial lawyers, while the claimant attempted to represent himself.

The critical factual issue in the case was whether or not the claimant was the member of a crew of a vessel and therefore excluded from the coverage of the act. The claimant testified and sworn statements of other members of the claimant's work crew were introduced presenting facts supporting the contention of the claimant that he was not the member of a crew of a vessel and rather was the supervisor or foreman of a construction project on Tom's Creek, a branch of the Altamaha River, in the State of Georgia. The employer and carrier through its counsel presented evidence to support their contention that the claimant was the member of a crew of a vessel.

At the close of the evidence both of the attorneys for the employer and carrier made oral closing arguments. The claimant was physically unable to re-

main throughout the entire evidentiary hearing and no closing argument was made for him.

At the conclusion of the hearing Judge Sullivan granted leave to both the claimant and the employer and carrier to submit written post-trial briefs in support of their respective positions and claimant thereupon secured the services of his attorney herein. Counsel for the employer and carrier presented their position on the issues of fact in a 38 page post-trial brief. And in response to the post-trial brief submitted by counsel for claimant the employer and carrier's attorneys submitted a 44 page reply brief. Thereafter Judge Sullivan entered his Decision and Order on September 8, 1975 finding the factual issues in favor of the claimant and adversely to the employer and carrier.

Employer and carrier thereupon filed a Petition for Amendment, Correction, and Reconsideration of the Decision and Order making factual and legal arguments in support of petitioner's position. This petition was rejected by Judge Sullivan and his Supplemental Decision and Order was entered on October 29, 1975.

Petitioners then appealed to the Benefits Review Board of the United States Department of Labor and in support thereof filed a 63 page brief raising the same factual issues and arguments made below. In response to claimant's brief to the Benefits Review Board petitioners filed a 43 page reply brief to the Board further embellishing the same arguments. Oral argument was permitted before the Board and petitioners

orally argued the same evidentiary points, their arguments encompassing 76 pages of the 97 page transcript of the oral argument. The Benefits Review Board after considering petitioners' positions and arguments, found that the record supported the finding that claimant was not a crewmember, affirmed the holding of the Administrative Law Judge, and entered its Decision accordingly on May 17, 1976.

The employer and carrier then filed an appeal with the United States Fifth Circuit Court of Appeals again citing the same factual issues and arguments with a 63 page main brief and a 30 page reply brief. The employer and carrier were also permitted oral argument before the Fifth Circuit Court of Appeals. By its Per Curiam decision entered April 1, 1977 the Court of Appeals affirmed the holdings below. The employer and carrier thereupon filed a Petition for Rehearing En Banc with the Court of Appeals supported by an 11 page brief. By Order entered May 31, 1977 the Court of Appeals denied that petition. The petitioners, now have filed their Petition for a Writ of Certiorari with this Court raising the same factual issues and questions so thoroughly litigated and extensively argued below.

ARGUMENT

1. Whether The Findings Of Fact By The Trier Of Fact, The Administrative Law Judge, Based Upon Evidence Received At The Evidentiary Hearing, Which Were Appealed To And Affirmed By The Benefits Review Board And Appealed To And Reaffirmed By

The United States Fifth Circuit Court Of Appeals Are A Proper Matter For This Court To Review By Certiorari?

From a reading of the petition of writ of certiorari filed by the employer and carrier with this Court it would appear that there was no disputed issue of fact below and that the Administrative Law Judge, Benefits Review Board, and United States Fifth Circuit Court of Appeals to whom were proffered petitioners' arguments and contentions on so many occasions, were totally oblivious to the testimony and evidence presented at the evidentiary hearing. The 11 pages of excerpts of testimony in petitioners' appendix glean from the 423 page record only the testimony favorable to petitioners entirely ignoring the evidence favorable to plaintiff which the trier of fact found convincing. Many of petitioners' factual representations bear no resemblance to the testimony in the record below. For example, throughout petitioners argument, the claimant is referred to as "Captain McIntosh". This misleading appellation was conferred upon the claimant by counsel for petitioners early in these proceedings as if by referring to him as such they can make it so. Not only is the term "Captain McIntosh" inaccurate it is in total and absolute conflict with the uncontradicted testimony of all witnesses. When claimant was interrogated on this issue by Judge Sullivan he testified:

> "Well, as I said, I wasn't a captain. I was sent up there to supervise the job, and if I had been a deck captain, or a captain, I would have been on that barge from the time it left the yard until it got to the Altamaha River . . ." (Tr. 30)

"JUDGE SULLIVAN: On February the 12th of 1975, what was your position with Parkhill-Goodloe?

THE WITNESS: I was job supervisor, Tom's Creek.

JUDGE SULLIVAN: And how long had you had that position prior to February 12th of 1975?

THE WITNESS: Well, about a week. See, I was the kinda man that if they wanted me for a deck captain, they used me for a deck captain. If they wanted me to hold down a captain's place, well, I did that. Then if they had a job such as this, that they need a supervisor to go on and supervise the job, then they usually send me." (Tr. 31)

Likewise each of the members of the work crew in their statements refused to agree with the attempt of carrier's counsel to categorize claimant as "Captain McIntosh". Stephen Hand testified:

"Q. Did you ever call Rudolph McIntosh captain?

A. Not on the job, no sir. . . .

Q. Do you know anything about Mr. McIntosh's title on either the XL or on the barge or tug, the job at Jesup?

A. The job at Jesup, he was just a . . . just a foreman, I reckon. . . .

Q. You just came up with the idea that he is a foreman yourself?

A. Unless he was a foreman or supervisor. He was running the job.

Q. And he was also captain of the whole job; was he not. He was also captain of the barge?

A. Not in my opinion. (Ex. ALJB, St. Hand 22-24)

The crane operator, James Shelton, testified:

Q. Now, who was in charge of the overall project up there?

A. Mr. McIntosh.

Q. What title did he have so far as you knew?

A. As far as I know, he was the job superintendent of that job, supervisor, superintendent.

Q. And who was in charge of the tug?

A. Well, Mr. McIntosh was . . . he was the boss of the whole job, and Eddie Williams he was the . . . well you might call him the tug captain or whatever you want. He was the only one that run the boat, had anything to do with it." (Ex. ALJA, St. Shelton 30-31)

William S. Gale testified as follows:

"Q. Was he in charge of the entire operation?

A. Yes, sir. He was our supervisor, foreman, whichever one you want to call it.

Q. Did you ever call him captain?

A. No, sir.

Q. Have you ever called him captain?

A. No, sir.

Q. Was he a deck captain?
A. No, sir, I don't think he ever was." (Ex. ALJA, St. Gale 78-79)

The erroneous use of the term "Captain McIntosh" by counsel for petitioners' has not benefitted them in the proceedings and appeals below and should not be given persuasive effect here, for what is presented here is a pure and simple challenge to a factual determination by the trier of fact.

This Court has specifically held that the determination of whether or not an employee is a member of a crew is a question of fact and is to be determined by the trier of fact. *South Chicago Coal & Dock Co. v. Bassett*, 309 US 251, 60 S. Ct. 544, 84 L. Ed. 732 (1939). In that case the Court held:

> "So far as the decision that this employee, who was at work on this vessel in navigable waters when he sustained his injuries was or was not "a member of a crew" turns on questions of fact, the authority to determine such questions has been confided by Congress to the deputy commissioner. *Hence the Court of Appeals correctly ruled that his finding, if there was evidence to support it, was conclusive* and that it was the duty of the District Court to ascertain that it was so supported, and, if so, to give it effect *without attempting a retrial*. (p. 257-258) (Emphasis Supplied)

In the original Decision and Order, Judge Sullivan, the trier of fact, found that Mr. McIntosh was not "a member of a crew". (Petitioners' Appendix page 30a)

In his Supplemental Decision and Order on the "member of a crew" issue, Judge Sullivan found as to employer and carrier's contentions:

> "The arguments proffered are a repetition of those advanced in the post-trial brief. They are not persuasive and are rejected".

In its Decision, the Benefits Review Board, found that "the record supports the Administrative Law Judge's conclusion that McIntosh was not a member of a crew so as to be excluded from coverage under Section 2(3) of the Act". The Fifth Circuit Court of Appeals after receiving two briefs and hearing oral argument affirmed per curiam. Now this Court is being asked to grant a writ of certiorari and conduct a retrial of the case on the factual issues.

The position of this Court as to such attempts was restated in *Senko v. Lacrosse Dredging Corp.*, 352 US 370, 1 L. Ed. 2d 404, 77 S. Ct. 415 (1957), a case involving an appeal from a jury finding that the plaintiff was a seaman in a Jones Act case. That finding was reversed by an Illinois state appellate court, and on petition for certiorari the United States Supreme Court reversed citing *South Chicago Co. v. Bassett*, Supra, as follows:

> "As we have said before, this Court does not normally sit to re-examine a finding of the

type that was made below. We believe, however, that our decision in *South Chicago Co. v. Bassett* (US) supra, has not been fully understood. Our holding there that the determination of whether an injured person was a 'member of a crew' is to be left to the finder of fact meant that juries have the same discretion they have in finding negligence or any other fact. The essence of this discretion is that a jury's decision is final if it has a reasonable basis, whether or not the appellate court agrees with the jury's estimate." (373, 374)

As shown in the recitation of facts in the Decision and Order of September 8, 1975 (Appendix to Petition pages 25a through 27a) the injury occurred to Mr. McIntosh while he was supervising a work crew in a snagging operation on Tom's Creek, a cutoff of the Altamaha River. The operation consisted in the removal of logs, trees, stumps and the like from the creek so as to permit a nuclear reactor to be shipped by barge through Tom's Creek.

The equipment used consisted of a barge with a crane mounted upon it, a tug the "Little Ed", a skiff and a pick up truck. The entire crew ate and slept ashore except for the noon meal eaten at the job site. They travelled to the job site via the truck to a landing and thence by skiff to where they were working. One man, James Shelton, was permanently assigned as crane operator and another, Eddie Rhodes, (also known as Eddie Williams) was the permanent tug boat operator. William Gale and Stephen Hand assisted in attaching the sling of the crane to snags and with loading and unloading logs on the barge. Mr. McIntosh directed the

entire crew. He was injured while they were attempting to pull over and uproot a large oak tree from the bank of the creek when a limb on the tree swung toward him, dislodging a previously loaded log which fell upon the claimant crushing his back and chest and rendering him a paraplegic.

After thoroughly reviewing those facts, the Administrative Law Judge found that Mr. McIntosh was primarily engaged in heavy construction work on navigable waters of the United States, and that the barge upon which the claimant was injured was a work platform and not in navigation. Judge Sullivan did not make up out of thin air the facts upon which he made his findings, they were based upon testimony and evidence in the record.

The Benefits Review Board disagreed that the barge was a work platform and held that it was in navigation. But, the Board upheld the Administrative Law Judge on the finding of fact that McIntosh's "primary duty was to supervise workers engaged in the snagging operation". (Petitioners' Appendix page 8a). The Board found "that there is substantial evidence to support the Administrative Law Judge's determination that McIntosh was not aboard primarily to aid in navigation". (Petitioners' Appendix page 7a) and even further "(a)lthough the results of his duties may have made the river easier to navigate, *he was not aboard primarily to aid in navigation*". (Petitioners' Appendix page 8a, Emphasis Supplied).

In its conclusion the Benefits Review Board held:

> "Therefore, the Board finds the record supports the Administrative Law Judge's conclusion that McIntosh was not a member of a crew so as to be excluded from coverage under Section 2(3) of the Act" (Petitioners' Appendix page 8a)

A retrial of those factual issues in this Court is what petitioners seek by writ of certiorari. Respondent contends that such a retrial by certiorari is neither fitting nor proper. Some years ago the Second Circuit Court of Appeals expressed its attitude in a similar situation as follows:

> "We have here another instance of an attempt on appeal to have us, as to the facts retry a case which has been tried on oral evidence in the Court below. Perhaps someday soon the admiralty bar will become convinced that such attempts are fruitless." *Fodera v. Booth American Shipping Corporation*, 159 F. 2d 795, 797 (1947)

In accordance with that concept and the precepts of *Bassett* and *Senko*, Supra, this Court should deny the Petition for Writ of Certiorari.

2. Whether The Conclusions Of Law Of The Administrative Law Judge, Affirmed By The Benefits Review Board, And Reaffirmed By The United States Fifth Circuit Court Of Appeals Are Proper Subjects For Review By This Court By Writ Of Certiorari?

Judge Sullivan determined that claimant was primarily engaged in an activity normally associated with heavy construction work and that any ancillary acts of seamanship he performed were incidental and minimal in relation to his primary duties. He therefore concluded that Mr. McIntosh was "*not* a member of a crew". (Petitioners' Appendix page 30a) (Emphasis original).

Having so found, the exclusion for the member of a crew of a vessel under Title 33 United States Code Annotated, §902 was inapplicable, and therefore the injury was compensable under the Longshoremen and Harbor Worker's Compensation Act as Amended.

The Benefits Review Board after reviewing the facts (Petitioners' Appendix pages 7a and 8a) likewise found that "McIntosh's primary duty was to supervise the workers engaged in the snagging operation". The Board then concluded from its review of the record "that there is substantial evidence to support the Administrative Law Judge's determination that McIntosh was not aboard primarily to aid in navigation", (Petitioners' Appendix page 7a) and likewise concluded that claimant "was not a member of a crew so as to be excluded from coverage under Section 2(3) of the Act". (Petitioners' Appendix page 3a).

These conclusions of law of both the trier of fact and the primary appeal tribunal are entirely in accord with the case law on this issue.

In this Court's decision in *Bassett* the distinction is made between a member of a crew of a vessel and a harborworker based on the criteria that a crew member is primarily on board to aid in the navigation of the vessel. In interpreting the former Longshoremen and Harbor Worker's Compensation Act on this very point this Court stated in *Bassett:*

> "That is our concern here in construing this particular statute — the Longshoremen and Harbor Worker's Compensation Act — with appropriate regard to its distinctive aim. We find little aid in considering the use of the term "crew" in other statutes having other purposes. This Act as we have seen, was to provide compensation for a class of employees at work on a vessel in navigable waters who, although they might be classed as seamen (*International Stevedoring Co. v. Haverty*, 272 US 50, 71 L. Ed. 157, 47 S. Ct. 19, supra) were still regarded as distinct from members of a "crew". They were persons serving on vessels, to be sure, but their service was that of laborers, of the sort performed by Longshoremen and Harbor Workers and *thus distinguished from those employees on the vessel who are naturally and primarily on board to aid in her navigation.*" (pages 259-260) (Emphasis Supplied)

The various circuit courts of appeal have consistently employed the same basic test in making the distinction between those covered by the Act and members of the crew, viz:

"The evidence indicates that Griffith was not aboard the barge primarily to aid in its navigation . . . A worker upon a barge whose primary duties involve the handling of cargo rather than carrying out of required navigational responsibilities is a longshoremen rather than a seaman." *Griffith v. Wheeling Pittsburgh Steel Corporation*, 521 F. 2d 31, 37, (3d Cir. 1975)

"The essential and decisive elements of the definition of a "member of a crew" are that the ship be in navigation; that there be a more or less permanent connection with the ship; *and that the worker be aboard primarily to aid in navigation. McKie v. Diamond Marine Co.*, 204 F. 2d 132, 136 (5th Cir., 1953) (Emphasis Supplied)

> "In the *Bassett* case, the Court noted that the word "crew" did not have 'an absolutely unvarying legal significance' . . . . Nor does it have a well-defined factual significance under the Longshoremen and Harbor Worker's Compensation Act. But, certain guides there are, although they are by no means magic touchstones. The questions concerns the plaintiff's 'actual duties'. Was the plaintiff on board 'naturally and primarily' to aid in the vessel's navigation." *Schantz v. American Dredging Co.*, 138 F. 2d 534, 537, (3d Cir., 1943) (Citations omitted)

In the more recent 1957 decision in *Senko v. Lacrosse Dredging Corp.*, Supra, this Court reaf-

firmed the same criteria of primary duties being determinative in the converse situation in a Jones Act case.

In the light of these decisions the conclusion of the Administrative Law Judge as affirmed by the Benefits Review Board was not only proper, but mandated. The contention of petitioners that the per curiam affirmance by the Fifth Circuit Court of Appeals conflicts with decisions of this Court and other courts of appeal is wholly without merit.

CONCLUSION

The course followed by this case is a monument to the persistency of a party in challenging a factual determination. In their petition to this Court, the employer and carrier are raising for the twelfth time the same factual arguments and contentions attacking the findings of fact at the trial level. Their contentions were made orally following the evidentiary hearing. They were made in writing in a post-trial brief, and again in a post-trial reply brief. They were found not to be supported by the evidence by Judge Sullivan in his findings of fact in the Decision and Order of September 8, 1975.

The same arguments were made in the Petition for Amendment, Correction, and Reconsideration of the Decision and Order and again found not persuasive and rejected in the Supplemental Decision and Order of October 29, 1975.

Petitioners then appealed to the Benefits Review Board and raised the same factual contentions and

arguments in their main brief, reply brief, and on oral argument. They were again found lacking merit and the Board affirmed Judge Sullivan.

The employer and carrier then petitioned the Fifth Circuit Court of Appeals for review and made the same factual arguments in their main brief, reply brief, and on oral argument. The Court of Appeals likewise rejected the arguments and affirmed. Petitioners then filed a Petition for Rehearing En Banc asserting the same contentions, which petition, the Fifth Circuit Court of Appeals denied.

And, now the United States Supreme Court is presented with the same factual challenges and arguments in an effort to retry the case in this Court on the record (specifically that part of the record which petitioners view to be favorable to them) to secure new independent findings of fact and substitute such findings for those of the trier of fact.

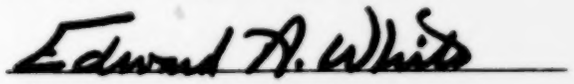
The workmen's compensation benefits recovered by Mr. McIntosh are provided to him by law, the carrier received a premium to extend them, the facts justify them, the Administrative Law Judge awarded them, the Benefits Review Board confirmed them, the Fifth Circuit Court of Appeals affirmed them and this Court, the United States Supreme Court, should guarantee them.

The factual arguments and contentions of the employer and carrier so repeatedly proffered should be finally and permanently rejected. The carrier should be told once and for all that it must respond un-

der its insurance contract and pay Mr. McIntosh the benefits of the Act which the facts justify and for which he has been forced to fight through a trial, two levels of appeal, and now into this Court to secure.

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Edward A. White, a member of the Bar of the Supreme Court of the United States do hereby certify that three copies of the foregoing brief of respondent, McIntosh, have been served by mail by depositing the same in a United States mail box with first class postage prepaid, this ____ day of November, 1977, duly addressed to the following:

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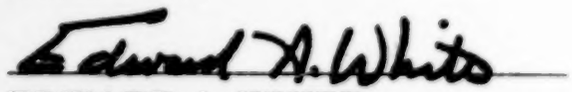

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